UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – DETROIT

In re:

GREEKTOWN HOLDINGS, LLC, et al.,

Debtors.
_____/

Case No. 08-53104
Chapter 11
Jointly Administered
Hon. Maria L. Oxholm

BUCHWALD CAPITAL ADVISORS, LLC, solely in its capacity as Litigation Trustee to the GREEKTOWN LITIGATION TRUST

Plaintiff,

v.

DIMITRIOS ("JIM") PAPAS, VIOLA PAPAS, TED GATZAROS, MARIA GATZAROS BARDEN DEVELOPMENT, INC., LAC VIEUX DESERT BAND OF LAKE SUPERIOR INDIANS, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, KEWADIN CASINOS GAMING AUTHORITY, and BARDEN NEVADA GAMING, LLC,

Defendants.
_____/

Adv. Proc. No. 10-05712

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION AND AMENDMENT OF SUMMARY JUDGMENT ORDER DENYING DEFENDANTS DIMITRIOS ("JIM") PAPAS, VIOLA PAPAS, TED GATZAROS, AND MARIA GATZAROS' MOTION FOR SUMMARY JUDGMENT (ECF No. 266)

On November 2, 2020, Defendants Dimitrios ("Jim") Papas, Viola Papas, Ted Gatzaros, and Maria Gatzaros' ("Defendants," "Papases" or "Gatzaroses") filed a Motion for Reconsideration and Amendment of Summary Judgment Order denying Defendants' Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, made applicable pursuant to

Federal Rule of Bankruptcy Procedure 7056 ("Opinion") (ECF No. 840). Defendants bring this motion pursuant to Eastern District of Michigan Local Bankruptcy Rule 9024-1(a) and Federal Rule of Bankruptcy Procedure 9023.

Defendants assert the Court committed palpable error on two issues. First, Defendants claim that this Court was misled as to the factual basis for the agency relationship between Greektown Holdings, L.L.C. ("Holdings") and Merrill Lynch, Pierce, Fenner & Smith Incorporated ("MLPFS) created by the Strategic Alternatives Letter. Specifically, Defendants claim that this Court found that under the Strategic Alternatives Letter, Holdings was not part of the "Greektown Entities" to whom MLPFS owed duties. Consequently, Defendants argue that the Court incorrectly concluded that "it is not necessary for the Court to determine whether MLPFS in its capacity as a sole financial advisor was an agent, because even assuming it was, it would be an agent of Greektown and not Holdings, per the signed agreement." [ECF No. 840, p 47]. Defendants maintain that this was a palpable error, further arguing that had the Court included Holdings as one of the Greektown entities to whom MLPFS owed duties, the Court would have concluded that the Strategic Alternatives Letter created an agency relationship between MLPFS and Holdings. Second, Defendants argue that this Court mistakenly resolved the agency issue as a matter of law and that such a ruling was premature pending discovery.

Federal Rule of Bankruptcy Procedure 9023 incorporates Federal Rule of Civil Procedure 59, except for reconsideration of claims as provided for under Fed. R. Bankr. 3008.

> A district court may grant a Rule 59(e) motion to alter or amend judgment only if there is: (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice. This standard is not inconsistent with the "palpable defect" standard applied by the [Eastern District of Michigan] district court pursuant to local rule.

Henderson v. Walled Lake Consol. Schools, 469 F.3d 479, 496 (6th Cir. 2006) (quotation marks and citation omitted); *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998) ("Rule 59(e) motions are aimed at *re* consideration, not initial consideration. Thus, parties should not use them to raise arguments which could, and should, have been made before judgment issued. Motions under Rule 59(e) must either clearly establish a manifest error of law or must present newly discovered evidence." (internal citations and quotation marks omitted) (emphasis in original)).

Local Bankruptcy Rule 9024-1(a)(3) sets forth the criteria for this Court to apply to a motion for reconsideration. That rule provides that a motion for reconsideration that merely presents the same issues ruled upon by the Court, either expressly or by reasonable implication, will not be granted. L.B.R. 9024-1(a)(3). The rule further provides that the moving party must demonstrate that a palpable defect has occurred by which the Court and the parties have been misled, and that a different disposition of the case must result from a correction of the defect. *Id.* "To establish a 'palpable defect,' the moving party generally must point to '(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.'" *In re Collins & Aikman Corp.*, 417 B.R. 449, 454 (E.D. Mich. 2009).

The Court holds that Defendants failed to establish that a palpable defect has occurred by which the Court and the parties have been misled, and that a different disposition of the case must result from a correction of the defect. Defendants do not allege any newly discovered evidence or an intervening change in controlling law. For the first issue, Defendants assert that this Court was misled as to the factual basis for the agency relationship, which falls under a "need to prevent manifest injustice" basis for reconsideration. As to the second issue, Defendants appear to argue

that the determination of the existence of an agency relationship as a matter of law was a clear error of law. The Court will first address the second issue.

The determination of the existence of an agency relationship was properly resolved as a matter of law. To establish an agency relationship between MLPFS and Holdings, Defendants--as the moving parties--relied on (1) the Strategic Alternatives Letter; (2) the Notes Purchase Agreement and (3) the New Credit Agreement. Defendants additionally argued that the Flow of Funds Memorandum confirms that the parties acted in accordance with the agreements. The parties did not dispute this evidence. The Court's predecessor, although not presented with the issue of agency, found that "[n]either party . . . contests the authenticity of any exhibit or disputes the occurrence or essential details of the transactions evidenced thereby. There are no genuine disputes as to any material facts, only as to how those facts should be construed and their legal consequences." [ECF No. 685, p. 8]. Because Defendants relied on written contracts to establish agency relationship and neither party disputed the validity of the agreements nor argued that any of them were ambiguous, the issue was properly decided as a matter of law.

The existence of agency is a question of law for the court "when the contract is in writing and there is no dispute or room for disputed inference as to the other documents, correspondence, and acts which might sometimes bear upon construction." *Texas Co. v. Brice*, 26 F.2d 164, 167 (6th Cir. 1928); *N.L.R.B. v. Int'l Bhd. of Elec. Workers*, 514 F.3d 646, 650 (6th Cir. 2008) ("Unless there is no genuine issue of material fact, the presence, or absence, of agency requires a factual analysis"). Defendants did not cite to any contrary authority that demonstrates a clear error of law. Accordingly, Defendants failed to establish a palpable defect and that a different disposition of the case must result from a correction of the defect.

The Court did not commit a palpable error in concluding that the Strategic Alternative Letter did not establish an agency relationship between Holdings and MLPFS. The Court did not find Holdings was not a part of Greektown Entities. Regardless, whether Holdings is part of Greektown Entities was not germane to the Court's ruling on agency. Furthermore, the Court did not hold that MLPFS owed no duties to Holdings as alleged by Defendants. The Court acknowledged that MLPFS was to act as exclusive advisor to Greektown and Holdings. However, owing a duty to numerous entities including Holdings, is not the same as Holdings authorizing MLPFS to act on its behalf and MLPFS being subject to Holdings' control. The Court held as follows:

> The Strategic Alternatives Letter is an agreement between MLPFS, identified as "Merrill Lynch" and Greektown Casino, L.L.C. ("Greektown"). [ECF No. 809-6, Exh. C]. Under this agreement, MLPFS was "to act as exclusive financial advisor to ... Greektown and Greektown Holdings, L.L.C. ('Holdings') in connection with exploring Strategic Alternatives" identified in the agreement from September 24, 2005 until July 31, 2006. Per this agreement Merrill Lynch was "retained to ***act solely as financial advisor*** to Greektown and the Greektown Entities. In such capacity, Merrill Lynch shall ***act as an independent contractor, and any duties of Merrill Lynch arising out of its engagement pursuant to this Agreement shall be owed solely to Greektown and the Greektown Entities***."[20] [ECF No. 809-6; Exh. D; ¶ 7] (emphasis added). According to this agreement, Greektown—not Holdings—authorized or retained MLPFS to act as a financial advisor. Thus, while Holdings may have benefitted from this agreement, the agreement does not evidence Holdings' assent that MLPFS act on its behalf or that MLPFS be subject to Holdings' control. It is not necessary for the Court to determine whether MLPFS in its capacity as a sole financial advisor was an agent, because even assuming it was, it would be an agent of Greektown and not Holdings, per the signed agreement. Moreover, the Strategic Alternatives Letter was superseded by the Note Purchase Agreement.

[ECF No. 840, p. 47]. Footnote 20 further provides,

> In the Strategic Alternatives Letter, Holdings is identified as "Holdings," Greektown Entities is identified as "any respective direct and indirect subsidiaries" of Greektown, Holdings and Monroe Partners, L.L.C. [ECF No. 809-6; Exh. D; ¶ 1]. Moreover, the signature block of this agreement is signed on behalf of Greektown Casino, L.L.C.

Id.

Thus, the Court did not omit from consideration the Strategic Alternatives Letter as evidence; rather, the Court concluded that, even assuming the agreement formed an agency relationship, any alleged agency relationship would be between Greektown and MLPFS. Holdings was not a party to the agreement.

Defendants additionally emphasize the language immediately above Greektown's signature block that provides "By signing below, Greektown agrees to and accept [sic] the terms and provisions of this Agreement and to cause Holding to accept the terms and provisions hereof." [ECF No. 817, Exh. D, p 8]. Defendants claim that this language evidences Holdings' assent. Defendants further point out that "Bruce Dall, the individual who signed the Agreement on behalf of Greektown, also signed the Note Purchase Agreement on behalf of Holdings. Mr. Dall clearly had the authority to and did in fact assent on behalf of Holdings to Merrill Lynch owing duties directly to Holdings." [ECF No. 842-1; p 7].

This language supports the Court's finding that Greektown was the principal--not Holdings. Greektown was "to cause" Holdings to be bound by the agreement. Greektown was the authorizing party. Moreover, the fact that Mr. Dall could have signed on behalf of Holdings is irrelevant, as he signed on behalf of Greektown.

Finally, Defendants urge this Court to focus on the actual relationship between MLPFS and Holdings during the process leading up to the Note Purchase Agreement. However, the Strategic Alternatives Letter, which is the only evidence relied on for the relevant time period, does not establish the requirements of an agency relationship between MLPFS and Holdings.

In conclusion, the Court did not make a finding in footnote 20. The Court clarifies that footnote 20 should properly indicate that Greektown Entities as defined in the Strategic Alternatives Letter includes "Greektown, Holdings and Monroe Partners, L.L.C. and/or any of

their respective direct and indirect subsidiaries." [ECF No. 817, Exh. D, ¶ 1]. The definition of Greektown Entities was not a basis for the Court's finding on the issue of agency. Accordingly, the Court holds that Defendants failed to establish a palpable defect that warrants a different disposition of the case.

IT IS HEREBY ORDERED that Defendants' Motion for Reconsideration and Amendment of Summary Judgment Order Denying Defendants' Motion for Summary Judgment is denied pursuant to E.D. Mich. L.B.R. 9024-1(a) and Fed. R. Bankr. P. 9023.

Signed on November 13, 2020

/s/ Maria L. Oxholm

Maria L. Oxholm
United States Bankruptcy Judge